91-972

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Railway Labor Act's status quo obligation require an employer subject to that command to refrain from selling a portion of its operations and affecting its employees while it bargains with its unions over the unions' outstanding proposals to negotiate an agreement that would require that employer to include in any such sale agreement provisions that would give the employees a right to follow their work to the new operator, preserve their collective bargaining agreements, and otherwise protect the interests of employees who might be affected by the sale?

PARTIES TO THE PROCEEDING

Petitioners are the following eight labor organizations and the Railway Labor Executives' Association (RLEA):*

American Train Dispatchers Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

International Brotherhood of Electrical Workers; and

Sheet Metal Workers' International Association.

Several other labor organizations were plaintiffs and appellants below, but they have since decided to no longer participate in this litigation. In compliance with Rules 12.2 and 12.4 of the Rules of this Court, petitioners have listed those unions as respondents herein; those respondent unions are: Transportation•Communications International Union (TCU) (including TCU's divisions, the American Railway & Airway Supervisors Association and the Brotherhood of Railway Carmen); the United Transportation Union and the International Brotherhood of Firemen and Oilers. The one respondent herein which was a defendant and appellee below is CSX Transportation, Inc.

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* RLEA is a voluntary, unincorporated association of the chief executive officers of most labor organizations which represent rail employees. A list of RLEA's affiliated organizations is reproduced in this Petition as Appendix G at 27a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American Train Dispatchers Association [hereinafter, "ATDA"] and seven other labor organizations,[1] all of which represent employees of respondent CSX Transportation, Inc. [hereinafter, "CSXT"], together with the Railway Labor Executives' Association [hereinafter, "RLEA"],[2] respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to

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[1] The petitioning labor organizations are listed on page ii of this Petition. Five other unions, which were plaintiffs and appellants below, have since decided to withdraw from further participation in this litigation; therefore, they are named as respondents in compliance with Rules 12.2 and 12.4 of the Rules of this Court and they are identified on page ii of this Petition.

[2] RLEA is a voluntary, unincorporated association of the chief executive officers of most labor organizations which represent rail employees. *See,* Appendix G at 27a.

review the judgment of that Court in *RLEA v. CSXT*, 938 F.2d 224 (D.C. Cir. 1991).

OPINIONS BELOW

The opinion of the court of appeals is reported at 938 F.2d 224 and is reproduced herein as Appendix A at 1a-13a. The opinion of the district court was rendered orally on May 9, 1990, and is not officially reported; it is reproduced herein as Appendix B at 14a-18a.

JURISDICTION

The decision of the court of appeals was issued on July 5, 1991, and petitioners filed a timely motion for rehearing on August 5, 1991. That petition for rehearing was denied by an order filed on September 19, 1991. App. D at 20a. This petition for a writ is timely under 28 U.S.C. 2101(c); petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the proper interpretation of the Railway Labor Act's bargaining and status quo commands; those statutory duties are set forth in Section 2 First, 5 First, 6 and 10 of that Act, 45 U.S.C. §§ 152 First, 155 First, 156 and 160, and are reproduced in this Petition as Appendix E at 21a-24a.

STATEMENT OF THE CASE

In 1926, Congress adopted the Railway Labor Act, 44 Stat. 577, 45 U.S.C. § 151, *et seq.* which, as relevant here, required rail carriers to bargain with their employees' duly designated representatives, especially if those representatives requested such bargaining, "prior to a decision of management adversely affecting their wages or working conditions . . . ." *Decision No. 119*, 2 R.L.B. Dec. 87, 96 (1921). That Act further provided that until the statute's bargaining processes had been completed,

"no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." 45 U.S.C. § 160.

This case arises out of rail labor's efforts to use the Railway Labor Act's bargaining processes to obtain an agreement to deal with the impact that line sales, leases or other transfers of existing lines are having on rail employees. Significantly, this case involves questions which go to the fundamental structure of the Act—*i.e.*, must a carrier bargain over a union's proposal to limit its managerial prerogative to sell or otherwise dispose of its physical assets, and must that carrier refrain from exercising that non-contractual, managerial prerogative during that bargaining.

This case's genesis traces itself back to the mid-1980's when the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] changed its policies as to the manner in which it would protect the interests of employees who might be affected by that agency's approval or exemption of a rail carrier's proposal to change its physical capacity by a sale, lease or other transfer for continued operations by a new operator. *See, Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. 490, 516-17 (1989) (Stevens, J., dissenting).[3] This change in Commission

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[3] *See, Ex Parte No. 392 (Sub-No. 1)*, 1 I.C.C.2d 810, 815 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table). One such policy change of particular significance here occurred when the ICC approved several of the line sales in this case. In one sale, *Brandywine Valley R.R.—Purchase*, 5 I.C.C.2d 765 (1989), the Commission concluded that 49 U.S.C. § 11347 required that it impose employee protective conditions that directed both CSXT and the purchasing carrier to participate in negotiations with CSXT's unions to devise an arrangement by which the forces to perform the work transferred by the sale would be selected. Subsequently, in another CSXT sale transaction, the ICC reversed *Brandywine* and ruled that there was no requirement of joint negotiations *and* no right for CSXT employees to follow their work to the purchaser *unless* CSXT and the purchaser had agreed to such a right in their sales agreement. *Wilmington Terminal R.R.—Pur-*

policy led rail labor to use the collective bargaining process to attempt to obtain by agreement what rail labor believed the Commission should, but was refusing to, impose as a condition of that agency's approval or exemption of transactions involving line transfers under 49 U.S.C. §§ 10901 or 11343. This case arises from those bargaining efforts.

Rail labor at first attempted to address the impact that these line transfers were having on rail employees by serving notices under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, directed to specific sales as they occurred. Petitioners' notices sought to deal with the specific impact of each individual line transfer on employees. *E.g., Chicago & North Western Transportation Co. v. RLEA*, 908 F.2d 144 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1073 (1991). However, once the moratoria in the national agreements barring proposals for general agreements expired on April 1, 1988,[4] petitioners began to serve "Section 6 notices" on our nation's major railroads, including respondent CSXT, which, in addition to wage and other rule proposals, requested those carriers to negotiate an agreement to deal with the impact that sales, leases and other transfers of portions of a carrier's system for continued operations might have on its rail employees.[5]

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chase and Lease, 6 I.C.C.2d 799, 814-15 (1990), *aff'd sub nom. RLEA v. ICC*, 930 F.2d 511 (6th Cir. 1991).

[4] Petitioners negotiate most major bargaining issues "nationally" —that is, by serving identical Section 6 notices on most railroads and then negotiating with a single representative for all carriers who have authorized that bargaining agent to represent them. The agreements which result from such national bargaining typically have "moratorium clauses" which prohibit either party for a specific period of time from serving a notice under Section 6 of the Act to change the agreement. The 1984 round of bargaining moratoria barred the serving of Section 6 notices prior to April 1, 1988.

[5] An example of a typical line transfer Section 6 notice is reproduced herein as Appendix F at 25a-26a. This notice sought an

Those bargaining efforts proved fruitless, partly because the carriers disputed rail labor's right to bargain over transactions that were subject to ICC jurisdiction, and the mediatory services of the National Mediation Board [hereinafter, "NMB"] were requested under Section 5 First of the Act, 45 U.S.C. § 155 First, to aid the parties in resolving all of their outstanding disputes, including the line sale controversy. Those mediatory services also proved fruitless, and on May 3, 1990, the President created Emergency Board No. 219 under Section 10 of the Act, 45 U.S.C. § 160, to investigate the pending disputes between most of our nation's carriers (including CSXT) and all but one of the petitioning labor organizations.[6] Executive Order No. 12714, 55 Fed. Reg. 19047 (May 8, 1990).

Emergency Board 219 issued its report on January 15, 1991, and when only three[7] of the eleven labor organizations involved had settled by the time the extended status quo expired on April 17, 1991, several of the remaining unions struck the carriers. Congress immediately intervened and on April 18, 1991, the President signed what became Public Law No. 102-29, 105 Stat. 169, which created a Special Board to consider requests to clarify ambiguities in Emergency Board 219's recommendations, and to modify those recommendations if the moving party satisfied what was in reality an impossible burden.

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agreement that would prevent carriers from abolishing jobs and would require the transferring carrier to have the new operator offer to hire the employees affected by the transfer and assume their collective bargaining agreements. These notices also sought monetary benefits for employees adversely affected by such transfers.

[6] Notices by, or involving, petitioner International Association of Machinists and Aerospace Workers [hereinafter, "IAM"] were not included in the NMB's release and are still under the NMB's mediatory jurisdiction. *See, IAM v. NMB*, 930 F.2d 45 (D.C. Cir.), *cert. denied*, 112 S.Ct. 173 (1991).

[7] Two petitioners and one respondent labor organization reached tentative agreements with the carriers prior to April 17, 1991.

Public Law 102-29 further provided that the Emergency Board's recommendations, as clarified or modified, would be binding on the parties "as though arrived at by agreement . . . under the Railway Labor Act" ten days after the Special Board issued its ruling on the requests to modify. Pub. L. No. 102-29, § 1(3), 105 Stat. at 170. The Special Board created by Public Law 102-29 considered various requests to clarify, and then to modify the Emergency Board's recommendations, and issued its final report on July 18, 1991. Pursuant to Public Law 102-29, the specific recommendations of the Emergency Board became the "agreement" for five petitioners herein on July 28, 1991.

One of the disputes considered by Emergency Board 219 was the line transfer controversy, but the Board made no recommendation as to how that dispute should be settled. Emergency Board 219 Report at 93. Congress was aware of the Board's treatment of the line transfer issue and it provided in Section 3(c) of Public Law 102-29, 105 Stat. at 170, that: "Issues on which Presidential Emergency Board No. 219 made no specific recommendation shall not be subject to consideration by the Special Board." Additionally, Emergency Board 219 had recommended that the parties adopt "a moratorium period for all matters on which notices might properly have been served when the last moratorium ended on July 1, 1988 to be in effect through January 1, 1995." Emergency Board 219 Report at 93.[8] Consequently, as of July 28, 1991, petitioners' Section 6 notices for a general line transfer agreement, except for the notice served by petitioner IAM, were "resolved," either by the agreements of two petitioners or by an Act of Congress for five peti-

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[8] The Emergency Board further provided that: "Notices for changes under Section 6 of the Railway Labor Act, accordingly, may be served by any of the parties on another party no earlier than November 1, 1994." Report at 93.

tioners, and new notices on this controversy may not be served until November 1, 1994.[9]

A. District Court Proceedings

While the line transfer dispute raised by rail labor's Section 6 notices was working its way through the Railway Labor Act's bargaining processes, respondent CSXT began to enter into agreements with other, but relatively small, rail carriers to transfer to those railroads marginally profitable portions of its rail system for contined operation by those carriers and their employees. Those transfer agreements all included provisions dealing with employee matters, such as whether the new operator would hire or give a preference to CSXT employees displaced by the transfer, and whether the new operator would be obligated to assume CSXT's labor agreements. *See*, Joint Appendix in D.C. Cir. No. 90-7079 [hereinafter, "J.A."] at 13; 374-75; 499-501.[10] Those agreements also assumed that CSXT would continue to participate in the movement of traffic over the lines being transferred to the new operators. *E.g.*, J.A. at 366 (granting of trackage rights to CSXT); 375 (car service arrangements); 383 (interchange of traffic).

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[9] *See* note 13, *infra*.

[10] For example, CSXT's January 26, 1989 agreement with Brandywine Valley Railroad provided that Brandywine would "make bona fide offers to hire approximately six (6) of CSXT's employees who were actively employed upon the Subject Property prior to the sale or were affected thereby." J.A. at 374. In contrast, CSXT's August 7, 1989 agreement with the Wilmington Terminal Railroad did not require Wilmington Terminal to hire any of the more than fifty (50) CSXT employees who were expected to be displaced by the transfer (see, *Wilmington Terminal R.R.—Purchase and Lease*, *supra*, 6 I.C.C. 2d at 805; J.A. at 365) and further provided, as did the other transfer agreements, that "[n]othing contained in this Agreement shall be construed as imposing on WTR any obligation to assume CSXT's collective bargaining agreements." J.A. at 365; *see also*, J.A. at 374.

Rail labor responded to CSXT's plans to consummate those line transfers prior to the completion of bargaining over the pending Section 6 notices by filing a two count complaint on September 22, 1989, with the United States District Court for the District of Columbia to enforce the Railway Labor Act's bargaining and status quo obligations. Petitioners sought to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1337(a), and asked for both declaratory and injuntive relief to prevent respondent CSXT from consummating the line transfers before the Railway Labor Act's bargaining processes were completed. Both sides moved for summary disposition and on May 9, 1990, the district court entered an order granting CSXT's motion to dismiss the complaint for failing to state a claim upon which relief could be granted. App. C at 19a.

According to the district court, rail labor's suit to enforce the Act's status quo obligation had to be dismissed because, "[i]n the Court's view, the mere ownership and operation of rail lines is not a working condition preserved by the Railway Labor Act status quo and I believe that's what the Supreme Court determined in the controlling case" (App. B at 15a)—*i.e.*, *Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. 490 (1989).[11] Rail labor noted an appeal to the United States Court of Appeals for the District of Columbia Circuit on May 17, 1990, invoking that court's jurisdiction under 28 U.S.C. § 1291.

B. Court of Appeals' Decision

Since the district court had disposed of rail labor's complaint on a motion to dismiss, petitioner's appeal presented the issue of whether the Railway Labor Act's status

[11] That portion of rail labor's complaint which sought to enforce the Act's bargaining obligation, the court concluded, did not present a live case or controversy because CSXT represented that it was bargaining and until the railroad refused to bargain, that claim was not justiciable. App. B at 17a. Petitioners did not challenge that ruling on appeal.

quo obligation could, *as a matter of law*, prevent a rail carrier from transferring a portion of its operations to another for continued operations while the transferring carrier was bargaining with its employees over the employees' request for an agreement to deal with the impact of such transfers on their employment. That issue, rail labor asserted, in turn required the court of appeals to address the scope of the Act's bargaining obligation because, as this Court's decision in *Pittsburgh & Lake Erie* shows, the scope of the Act's status quo obligation is determined by the scope of the bargaining obligation. The answer to both questions, rail labor asserted, depended upon whether this Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), applied to the Railway Labor Act, as CSXT argued, or whether this Court's decisions in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), and *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969), controlled the bargaining and status quo issues in partial line sale cases, as petitioners argued.

Respondent CSXT's position was accepted by the court of appeals, for the appellate court concluded that this Court's decision in *Pittsburgh & Lake Erie* stands for the proposition that when a railroad decides to "leave the market" by selling a portion of its rail system, both *Telegraphers* and *Shore Line* are inapplicable. As the panel stated (App. A at 11a):

> The fundamental rule of *P&LE*, in our view, is that the railroad's "freedom to leave the market," 491 U.S. at 508 n.17, by terminating an operation or selling assets, is a matter of managerial prerogative. Nothing in the RLA indicates that a union can usurp that prerogative by filing a section 6 notice proposing to add a successorship clause to the collective bargaining agreement and then claiming that the railroad would violate the status quo by selling its assets before the termination of bargaining over the proposal.

Building upon its conclusion that *Pittsburgh & Lake Erie* applied to *more* than the exercise of the fundamental managerial prerogative to leave a business *entirely*, the appellate court found that petitioners "could not reasonably expect CSXT to continue to own and operate unprofitable lines, or management to consult with the unions before selling such lines." App. A at 12a. The court then added (*id.*):

> Contrary to RLEA's premise, continued employment is not necessarily a working condition. *P&LE* establishes that at least in the context of management's freedom to withdraw from the market, "the relationship of employer-employee and the state of being employed" are not frozen by the status quo provisions of the RLA. *See* 491 U.S. at 505. The unions do have the right to bargain over the effects of line sales on employees. *See id.* at 512. But the transactions themselves may not be stalled by the railroad's bargaining obligations.

In short, the appellate court opined that Section 6 of the Railway Labor Act did "not give the union the right to 'dictate the terms of the sale, and in effect challenge[] the decision to sell itself.'" App. A at 12a *quoting* 491 U.S. at 512. Thus, "in the absence of an existing obligation in a labor agreement (or perhaps some past practice that has 'ripened into a commitment,' . . .), the railroad's capacity—the number of lines it operates—is not part of the status quo." App. A at 11a.[12] This petition has followed to request this Court to review the court of appeals' extension of *First National Maintenance*'s rationale to the Railway Labor Act by its impermissible, restrictive reading of *Telegraphers* and *Shore Line*, something that this Court declined to do in *Pittsburgh & Lake Erie*.

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[12] Petitioners asked the panel to rehear this case, but on September 19, 1991, the court issued a ruling denying that request; it also rejected petitioners' suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question concerning the proper interpretation of the Railway Labor Act's bargaining and status quo obligations that is of exceptional importance to the orderly administration of this labor statute, but which has been decided by the lower courts in a way that conflicts with this Court's decisions in *Pittsburgh & Lake Erie R.R. v. RLEA* [hereinafter, *"P&LE"*], 491 U.S. 490 (1989), *Detroit & Toledo Shore Line R.R. v. UTU* [hereinafter, *"Shore Line"*], 396 U.S. 142 (1969), and *Order of Railroad Telegraphers v. Chicago & North Western Ry.* [hereinafter, *"Telegraphers"*], 362 U.S. 330 (1960). Indeed, petitioners submit, the lower courts, by concluding that there is "no sensible basis for distinguishing between a sale of all assets and a sale of individual lines" (App. A at 10a), and then by relying upon *P&LE* to justify their rulings, have ignored this Court's awareness and repeated admonition in *P&LE* that the facts before it involved the "extreme case" where the railroad had decided "to sell all its lines and go out of business." 491 U.S. at 508 n.17. By ignoring the reason for the *P&LE* Court's distinction between partial and entire line sales, the lower courts have, in fact, applied the balance struck in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), to the Railway Labor Act—something that this Court declined to do in *P&LE*. Moreover, they have exempted carriers from the Act's central requirement that during the status quo period they must maintain and preserve unchanged those non-agreement "conditions out of which the dispute arose" (45 U.S.C. § 160)—something this Court also declined to do in *P&LE*. Since the validity of these conclusions go to the fundamental structure of the Act and have been decided in a way that distorts the prior rulings of this Court, the petition should be granted.[13]

[13] Even though all but one of the disputes with respondent CSXT, which were raised by the Section 6 notices, have been resolved, either by agreement or by congressional action, this case is not moot. First, petitioner IAM's notice is still unresolved. And second, peti-

2. In this case, the lower courts relied upon this Court's opinion in *P&LE* to conclude that the decision of a carrier subject to the Railway Labor Act to reduce its "capacity" by selling a portion of its operating system—*i.e.*, "to leave the market"—involved a managerial prerogative that was not a subject over which the unions might reasonably expect CSXT to bargain. App. A at 11a-12a. Building upon that conclusion, the appellate court opined that the Railway Labor Act should not be construed as requiring CSXT to refrain from selling while it bargained with the unions about an agreement to limit CSXT's managerial prerogative (App. A at 12a), for, the court held, "the railroad's capacity—the number of lines it operates—is not part of the status quo." App. A at 11a. While those conclusions are consistent with this Court's decisions in *P&LE*, insofar as a decision to go out of business *entirely* is concerned and where the Section 6 notices have been served after the decision to sell has been made (*see P&LE*, 491 U.S. at 512 n.19), they are, nonetheless, not supported by this Court's decision in *P&LE*, for this case involves partial line sales—something which is far different than the sale of an entire business. Contrary to the appellate court's assertion, this Court's prior decisions show that there is a very real and "sensible" distinction between the sale of all rail lines, as was involved in *P&LE*, and the sale of a small portion of a carrier's operations, as is involved in this case.

a. This Court's decision in *P&LE* was premised upon its conclusion that it should be guided by the admonition in *Textile Workers v. Darlington Manufacturing Co.*, 390 U.S. 263 (1965), that "the decision to close down a business *entirely* is so much a management prerogative that

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tioners sought to prevent CSXT from selling its lines during the bargaining process, but the carrier, nevertheless, sold several lines and affected employees during the pendency of this litigation. App. A at 5a. Thus, the validity of the carrier's actions in affecting employees during the pendency of the bargaining presents a live case or controversy.

only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this case." 491 U.S. at 509 (emphasis added). *P&LE*, as well as prior decisions of this Court, recognize that the decision to leave the business *entirely* is far different than a managerial decision to reduce capacity while still remaining in business; indeed, the former decision can be made for reasons that would invalidate the latter—such as for anti-union reasons as in *Darlington*. For example, this Court noted in *P&LE*, 491 U.S. at 507 n.16, that in *Darlington* it "thought that a partial liquidation might present a different case . . . ;" moreover, the *P&LE* Court distinguished the facts before it from those involved in *Telegraphers* by stating that "[i]n *Telegraphers* a railroad was seeking simply to eliminate or consolidate some of its little-used local stations. The railroad here, by contrast, sought to sell all of its lines and go out of business." 491 U.S. at 508 n.17.

This distinction is not "senseless," for as this Court's reliance in *P&LE* on *Darlington*, and not *First National Maintenance*, shows, the right to leave a business *entirely* is the fundamental managerial prerogative that can be restricted only by the clearest expression of congerssional intent, such as that found in the Interstate Commerce Act, presumably because of the constitutional considerations which are implicated by such a decision. *Accord*, *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920); *see also*, *RLEA v. ICC*, 735 F.2d 691, 701-02 (2d Cir. 1984). This is far different than a decision to reduce capacity but yet stay in business, for in that situation, as this Court's opinion in *First National Maintenance* shows, the issue as to whether that decision is a mandatory subject of bargaining turns on a balancing that is irrelevant under *Darlington*—*i.e.*, whether "the harm likely to be done to an employer's need to operate

freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making that decision"—and depends on the particular facts involved. 452 U.S. at 686 and n.22. No such balancing was attempted in *P&LE*, and none was needed because in that case *Darlington's* rationale applied.

b. When a railroad decides to sell its entire system, as in *P&LE*, the seller will no longer be a railroad after the sale, and, more important from a labor relations perspective, will no longer be an employer. *See P&LE*, 491 U.S. at 509. On the other hand, when a railroad "downsizes" its "capacity," it remains a carrier subject to the Railway Labor Act and, significantly, it remains an employer: it will still have an employment relationship with the workers whose seniority will be affected by the sale; and it will still have to deal with the unions which represent those employees. Consequently, those unions have every reason to expect that carrier to bargain with them over the impact that rail line sales will have on their members and to conclude an agreement, such as the Washington Job Protection Agreement of 1936 referred to in *Telegraphers*, 362 U.S. at 337-38, to ameliorate those adverse affects.

Bargaining to limit managerial prerogatives to alter capacity has been common in the rail industry, and as this Court noted in *Telegraphers* (362 U.S. at 338): "It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employes as well as the interests of the railroad and the public at large." Additionally, if the railroad has a duty to bargain over limitations to its currently unfettered managerial prerogative to set the terms of any sale, *Shore Line*, even as qualified by *P&LE*, shows that those non-agreement, managerial prerogatives may not be exercised during the bargaining process, unless rail labor has in the past acquiesced to

such an exercise.[14] *Shore Line*, 396 U.S. at 150, 153-54; *see P&LE*, 491 U.S. at 506 n.15 (*Shore Line* rejected the assertion that RLA's status quo obligation did not apply to non-agreement working conditions which, absent a Section 6 notice by the union, could be changed by a carrier without bargaining).

c. Several points are obvious from *P&LE*, *Darlington*, *Shore Line* and *Telegraphers*. First, the courts below were wrong in asserting that the managerial prerogative involved in the sale of an entire railroad is the same as that involved in partial line sales, such as those at bar involving approximately 2% of CSXT's rail system. App. A at 3a. Second, the question that has to be decided before it can be concluded that the status quo obligation does not apply to partial line sales is whether the balance struck by *First National Maintenance* applies to the Railway Labor Act. However, the courts below did not even attempt to consider such a balance and they could not simply assume that it applied here, for *Telegraphers* shows that the broader duty to bargain under the Railway Labor Act results in the conclusion that carriers *must* bargain with their employees, *if* those employees so request, over proposals to limit the carriers' managerial prerogative to set the terms of line sales. And finally, the utter failure of the courts below to appreciate the significance of the distinction between the sale of an entire business and a partial line sale when they distinguished *Telegraphers* and *Shore Line* is, by itself, a compelling reason for this Court to exercise its discretionary powers to review the validity of the court of appeals' decision.

3. This controversy over rail labor's ability to preserve the status quo while it bargains with our nation's rail-

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[14] CSXT claims that it has exercised that prerogative in the past with rail labor's acquiescence, but petitioners have disputed that factual assertion; that factual dispute, however, is irrelevant to the question presented by this petition, because it will arise only after that question is answered in the affirmative and the status quo obligation is found to apply to the continued operation of rail lines.

roads for an agreement to deal with line transfers has been impairing labor relations in the rail industry for more than five years. Moreover, even though Emergency Board 219 and Public Law 102-29 have sidetracked this dispute for the time being, they have not resolved it, and it will most certainly arise once again when the current moratoria expire in November 1994, especially since the railroads have thousands of more rail miles to sell. *Short Line Reporter*, Vol. 1, Issue 1, October 1991.

Nor have the several appellate courts which have recently examined this issue put it to rest,[15] for those decisions lack a consistent thread, except for the most recent decision, *CSXT v. UTU*, 2d Cir. No. 91-7675, decided December 16, 1991, which essentially adopts the flawed reasoning of the court of appeals in this case and part of the Seventh Circuit's decision in *Chicago & North Western Transportation Co. v. RLEA*, *supra* note 15, that there is no sensible distinction between partial and entire line sales. Slip op. at 17. But, as we explained above, this Court's decisions in *P&LE*, *Darlington*, *Telegraphers* and *First National Maintenance* show that there is a very real and meaningful distinction between the two forms of managerial prerogatives. Moreover, *Telegraphers* rejected the assertion that a union's efforts to bargain with a railroad "about the job security of its members 'represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations.' " 362 U.S. at 336, *quoting*, 264 F.2d 254, 259 (7th Cir. 1959) (footnote omitted). This is crucial to the continued viability of the courts of appeals' rulings because their conclusion that *Shore Line* does not control the status quo question turns on their assumption that

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[15] *Compare*, *RLEA v. Chicago & North Western Transportation Co.*, 890 F.2d 1024 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 3237 (1990), *with*, *Chicago & North Western Transportation Co. v. RLEA*, 908 F.2d 144 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1073 (1991).

the bargaining obligation at issue in line sales, which is identical to that obligation involved in *Telegraphers*, is a non-mandatory subject of bargaining because it involves a fundamental managerial prerogative; that conclusion, however, is in conflict with *Telegraphers* and with this Court's refusal in *P&LE* to overrule *Telegraphers*. 491 U.S. at 508 n.17; *see, RLEA v. Chesapeake Western Ry.*, 915 F.2d 116, 120 n.4 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1312 (1991).

However, there is an urgent need for a definitive resolution to this controversy, for the question presented by this case transcends the line sale controversy and is important to both the rail and airline industries. Indeed, in this period of deregulation and recession with the increasing reliance on "price competition," both railroads and airlines are trying to lower their labor costs as a quick way to increase their profitability. This, along with other factors, has led to railroads and airlines selling or shedding portions of their operations to become more "cost-competitive," and this, in turn, has made the issue of exactly what does the Act's status quo obligation require all the more troublesome, and contentious. *See generally* opinions concerning rehearing *en banc* in *ALPA v. Eastern Air Lines, Inc.*, 863 F.2d 891 (D.C. Cir. 1988).

This urgency is all the more crucial in the rail industry, for by concluding that the "freedom to leave the market" at issue in *P&LE* is the same "freedom" being exercised by CSXT here, or by any railroad selling a portion of its lines, the courts of appeals have grossly misconstrued what is happening. When a railroad sells a portion of its lines, especially to small railroads that do not connect with alternative line haul railroads, the selling railroad does not intend to "leave the market." Indeed, the rail industry itself has acknowledged this, for the Association of American Railroads has stated that:

> The interest, concerns, and financial stability of all railroads in the U.S. are, to a significant degree, in-

> terdependent. Large and small railroads form an integrated transportation system employing primarily standardized rights-of-way and equipment. Small railroads originate, carry (bridge), and terminate traffic for their larger brethren and therefore are a component of the total service offered to shippers.

STATISTICS OF REGIONAL AND LOCAL RAILROADS, preface at (i) (AAR 1988).

Consequently, when a Class I railroad, such as CSXT, sells marginal lines to a new or small carrier for continued rail operations, that Class I carrier *does not* leave the market. Rather, as the sales agreements in the case at bar show, the Class I carrier expects to continue to move most, if not all, of the traffic that originated or terminated on that line when it owned it. In other words, the selling carrier continues to maintain a presence in those markets, for it has simply sold its switching, short haul, maintenance and related work to the new operator; it has merely altered its operations by changing an aspect of its service to its shippers.

The reality of what is happening has not been hidden from the employees, for they face the truth each day they interchange cars with the new operator's employees who are doing the work that they or their former co-workers used to perform prior to the sale. If the Railway Labor Act's major dispute resolution procedures are to operate as their drafters and Congress intended (*see, Shore Line*, 396 U.S. at 155), it is important that this Court review the court of appeals' decision in this case and determine whether *Telegraphers* and *Shore Line* have been overruled by *P&LE* as the lower courts have surmised.

CONCLUSION

For the reasons set forth herein, the writ should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 5, 1991 Decided July 5, 1991

No. 90-7079

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Appellants

v.

CSX TRANSPORTATION, INC.

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 89-2639)

John O'B. Clark [*sic*], *Jr.*, with whom *L. Pat Wynns* was on the brief, for appellants.

Ronald M. Johnson, with whom *T. Jay Thompson* was on the brief, for appellee.

Before WALD, BUCKLEY, and SENTELLE, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: The Railway Labor Executives' Association and thirteen unions representing employees of CSX Transportation, Inc. ("CSXT"), one of the nation's largest railroads, brought an action claiming that the railroad's sale of rail lines prior to the completion of collective bargaining violated the Railway Labor

Act, 45 U.S.C. §§ 151-163 (1988) ("RLA"). The district court (Lamberth, J.) dismissed the union's complaint. On the authority of *Pittsburgh & Lake Erie Railroad v. RLEA*, 491 U.S. 490 (1989) ("*P&LE*"), the court ruled that "the mere ownership and operation of rail lines is not a working condition preserved by the Railway Labor Act status quo" obligation. Transcript of Hearing, May 9, 1990, at 2, *reprinted at* Joint Appendix ("J.A.") 861. We affirm.

I. Background

In 1988, the major rail unions served bargaining notices on most Class I carriers, including CSXT, pursuant to section 6 of the RLA, 45 U.S.C. § 156. The notices called for negotiations over changes that the unions proposed to make to existing collective bargaining agreements. The proposals included successorship clauses—clauses providing that if the carrier sells or otherwise transfers any rail lines, it must require the purchaser or transferee to hire the affected employees and assume their collective bargaining contracts. The notices also sought labor protections and compensation, including penalty pay, for workers adversely affected by the sale, transfer, or abandonment of a line. CSXT's existing contracts did not contain any such provisions.

Along with other Class I carriers, CSXT entered into national bargaining over the section 6 notices. The railroads and unions invoked the services of the National Mediation Board, as provided in section 5 First of the RLA, 45 U.S.C. § 155 First, but to no avail. In April 1990, the parties declined the Mediation Board's offer of arbitration, and on May 3, 1990, the President created an emergency board pursuant to section 10 of the RLA, 45 U.S.C. § 160, to recommend a resolution of the dispute. That was the bargaining posture at the time of the district court's May 9, 1990, ruling. The presidential emergency board issued its report on January 15, 1991. The emergency board's recommendations did not produce a

settlement of all issues, and Congress ultimately intervened to avoid a national rail strike. *See* Pub. L. No. 102-29, 105 Stat. 169 (1991). The results of this lengthy bargaining process are not at issue in the present case.

Our focus is on line sales that CSXT entered into after the unions served their bargaining notices but before the mediation process required by the RLA had been exhausted. In that period, CSXT agreed to sell six marginal lines, amounting to approximately two percent of its rail system, to small, short-line carriers. At least two of the relevant sales agreements required the purchasing carriers to accord hiring rights to certain affected workers, but none obligated the purchaser to assume CSXT's collective bargaining contracts.

Because these transactions involved the purchase of railroad property by other carriers, they could only be consummated with the approval and authorization of the Interstate Commerce Commission ("ICC") pursuant to sections 11343 and 11344 of the Interstate Commerce Act ("ICA"). *See* 49 U.S.C. §§ 11343, 11344 (1988). As a condition of such approval, the ICC must ensure that the railroads "provide a fair arrangement . . . protective of the interests of employees who are affected by the transaction." *Id.* § 11347. To satisfy section 11347, the ICC imposes a set of labor protections commonly known as the *New York Dock* conditions, after *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979). *See RLEA v. ICC*, 930 F.2d 511, 512 (6th Cir. 1991).

The ICC eventually approved each of the sales transactions involved here, subject to the *New York Dock* conditions. *See, e.g., Wilmington Terminal R.R.—Purchase & Lease—CSXT*, 6 I.C.C.2d 799 (1990), *aff'd sub nom. RLEA v. ICC*, 930 F.2d 511 (6th Cir. 1991); *Brandywine Valley R.R.—Purchase—CSXT*, 5 I.C.C.2d 765 (1989), *pet. for review dismissed*, No. 89-1503 (D.C. Cir.

Mar. 27, 1991). To implement the labor protections imposed by the ICC, CSXT and the purchasing carriers were required to negotiate agreements with their respective employees that would supplement the seniority rights provided under existing collective bargaining contracts. In line with *New York Dock*, the implementing agreements had to guarantee, among other things, that any employee displaced or dismissed as a result of the transaction would continue to receive full pay and benefits for up to six years. *See, e.g., RLEA v. ICC*, 930 F.2d at 513.

The ICC, however, rejected the unions' construction of section 11347 and refused to require the purchasing carriers to hire CSXT's employees or, as to any employees they did hire, to recognize the employees' unions or their collective bargaining agreements with CSXT. *See, e.g., Wilmington Terminal*, 6 I.C.C.2d at 819-26. The Sixth Circuit has affirmed the ICC's interpretation of section 11347. *RLEA v. ICC*, 930 F.2d at 514-20.

Appellants (collectively, "RLEA") filed the present action for declaratory and injunctive relief on September 22, 1989, before CSXT had consummated the sales. RLEA claimed that if CSXT sold its rail lines before exhausting the mediation process, it would violate sections 2 First, 5 First, and 6 of the RLA, which impose twin obligations on the railroad: an obligation to bargain over section 6 proposals, and an obligation to maintain existing working conditions while bargaining proceeds. *See* 45 U.S.C. §§ 152 First, 155 First, 156.

In dismissing RLEA's status quo claim, District Judge Lamberth applied the Supreme Court's opinion in *P&LE*, which held that the status quo obligation cannot be used to prevent a railroad from implementing an agreement to sell all of its assets. *See* 491 U.S. at 504-11. He ruled that the rationale of *P&LE* "does not make a distinction between partial and total sales." J.A. 861-62 (relying on *RLEA v. Chicago & N.W. Transp. Co.*, 890 F.2d 1024 (8th Cir. 1989) ("*RLEA v. C&NW*"), *cert. denied*, 110

S.Ct. 3237 (1990)). The transactions could go forward, in his opinion, because nothing in CSXT's existing collective bargaining agreements prevented such line sales or the resulting force reduction and furloughs.

Judge Lamberth also concluded that there was no present case or controversy concerning CSXT's bargaining obligation, as RLEA had conceded that CSXT was in fact participating in the ongoing mediation. RLEA does not challenge this aspect of the ruling on appeal. We therefore have no occasion to address whether and, if so, to what extent CSXT had a duty to bargain, even after ICC approval, over the effects of the line sales on its employees. *See P&LE*, 491 U.S. at 512 & n.19; *RLEA v. C&NW*, 890 F.2d at 1025-26.

Following the judge's ruling, *New York Dock* implementing agreements were put in place for all six transactions. As of oral argument before this court, five of the six sales had been consummated.

II. Discussion

The RLA mandates multistaged procedures for resolving disputes over proposed changes in labor agreements. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). The procedures "are purposely long and drawn out," *P&LE*, 491 U.S. at 504 (quoting *Brotherhood of Ry. & Steamship Clerks v. Florida E.C. Ry.*, 384 U.S. 238, 246 (1966)), and until the waltz is over, "neither party may unilaterally alter the *status quo*." *Jacksonville Terminal*, 394 U.S. at 378.

Section 2 Seventh forbids the carrier from making any change in "the rates of pay, rules, or working conditions of its employees," as embodied in collective bargaining agreements, except by way of section 6. 45 U.S.C. § 152 Seventh. Section 6 provides in relevant part that both the railroad and the union must give at least thirty days' written notice of any proposed change in an agreement, and once notice is given, "rates of pay, rules, or working

conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . by the Mediation Board." *Id.* § 156.

Where an offer of arbitration from the Mediation Board has been refused, section 5 First provides that for thirty days after the Board notifies both parties that its efforts have failed, "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." *Id.* § 155 First. And if, as here, a presidential emergency board is created during this cooling-off period, under section 10 "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose" until thirty days after the emergency board has reported to the President. *Id.* § 160.

In *P&LE*, the Supreme Court ruled that where, as in the present case, existing labor agreements do not prevent a railroad from selling its assets and do not shield employees from the adverse consequences of a sale, the railroad need not give notice under section 6 before selling all its assets and is not obligated to bargain over the sale or delay its implementation. *See* 491 U.S. at 504. The Court further held that the railroad could proceed with the sale, once approved by the ICC, even though the unions had given notice proposing a successorship clause and other labor protections essentially identical to those proposed by CSXT's unions. *See id.* at 509; *see also id.* at 497 n.5 (quoting unions' proposals).

The Court concluded:

> [T]he decision to close down a business entirely is so much a management prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this case. Absent stat-

> utory direction to the contrary, the decision of a railroad employer to go out of business and consequently to reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provision of § 156. . . . The RLEA concedes that had the collective-bargaining agreements expressly waived bargaining concerning sale of P&LE's assets, the unions' § 156 notices to change the agreements could not trump the terms of the agreements and could not delay the sale. . . . We think the same result follows where the agreement is silent on the matter and the railroad employer has proceeded in accordance with the ICA. In these circumstances, there is little or no basis for the unions to expect that a § 156 notice would be effective to delay the company's departure from the railroad business. Congress clearly requires that sales transactions like P&LE's proposal must satisfy the requirements of the ICA, but we find nothing in the RLA to prevent the immediate consummation of P&LE's contract to sell.

Id. at 509.

RLEA's only argument to us is that the district court misread the reach of *P&LE*. According to RLEA, "the rationale in *P&LE* rests entirely on a distinction between partial and total line sales." Brief for Appellants 10. RLEA claims that CSXT's status quo obligation is governed instead by two earlier Supreme Court decisions, *Order of Railroad Telegraphers v. Chicago & North Western Railway*, 362 U.S. 330 (1960) (*"Telegraphers"*), and *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142 (1969) (*"Shore Line"*).

Telegraphers involved a railroad's decision to abandon a large number of its local stations and thus remove several hundred station attendants from the payroll. The Court held that the union had a right to strike to prevent the railroad from implementing the partial abandonment

without first bargaining over its effects. *See* 362 U.S. at 339.

In *Shore Line*, a railroad proposed to institute new work assignments, a change neither authorized nor prohibited by its collective bargaining agreement. The Court held that once the union had served notice of its intent to bargain over the new assignment scheme, the railroad was obligated to maintain the status quo. *See* 396 U.S. at 153-55. The Court rejected the railroad's argument that the status quo encompassed only working conditions expressed in the parties' collective bargaining agreement. Rather, the Court concluded, status quo refers to "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Id.* at 153.

The Court in *P&LE* dealt extensively with *Shore Line* and distinguished it on three grounds. First, *Shore Line* "extended the relevant language of § 156 to its outer limits, and we should proceed with care before applying that decision to the facts of this case." 491 U.S. at 506. The Court expressed doubts about the conclusion in *Shore Line* that the status quo obligation extends to working conditions that objectively exist in practice even though not embodied in a collective bargaining agreement; but, without disturbing that holding, the Court stated that it was "not inclined to apply *Shore Line* to the decision of P&LE to go out of business." *Id.* at 506 n.15.

Second, the working condition at issue in *Shore Line*—the location of work assignments—"had been the unquestioned practice for many years." Thus, it was "reasonable for employees to deem it sufficiently established that it would not be changed without bargaining and compliance with the status quo provisions." *Id.* at 506.

Third, *Shore Line* "did not involve a proposal by the railroad to terminate its business." *Id.* at 507. "Whatever

else *Shore Line* might reach, it did not involve the decision of a carrier to quit the railroad business, sell its assets, and cease to be a railroad employer at all . . . ." *Id.* The Court relied on *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965), in concluding that such a decision has "legal significance." 491 U.S. at 507. *Darlington*, a case decided under the National Labor Relations Act ("NLRA") held that an employer "has an absolute right to terminate his entire business for any reason he pleases." 380 U.S. at 268, *quoted in* 491 U.S. at 507.

The Court dismissed *Telegraphers* in a footnote discussing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). *See P&LE*, 491 U.S. at 508 n.17. *First National* held that an employer's decision to close down a segment of its business is not among the "terms and conditions" for mandatory bargaining under the NLRA because "an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." 452 U.S. at 686. *First National* distinguished *Telegraphers* on the ground that its "expansive" reading of the RLA did not govern a decision under the NLRA. *See id.* at 686-87 n.23.

Although *P&LE*, unlike *First National*, was governed by the RLA, the Court in *P&LE* distinguished *Telegraphers* on the facts: In *Telegraphers*, "a railroad was seeking simply to eliminate or consolidate some of its little-used local stations," whereas P&LE was seeking "to sell all its lines and go out of business." 491 U.S. at 508 n.17. The Court observed, "There is nothing in *Telegraphers* that forces us to reach the result, in this extreme case, that P&LE was prohibited from terminating its operations without first bargaining with the unions." *Id.*

In sum, the critical issue in *P&LE* was "a railroad's freedom to leave the market." *Id.* That was precisely the

issue, in the Court's view, that *Shore Line* and *Telegraphers* did not involve. *Id.*

RLEA argues that but for the distinction between the sale of an entire railroad and the sale of a portion of its lines, the Court could not have decided *P&LE* without first overruling *Telegraphers*. RLEA concedes that in the absence of the section 6 notices, CSXT's ability to sell its lines is a managerial prerogative that is not limited by any existing agreement, either express or implied. But once the notices were served, RLEA contends, CSXT violated the status quo obligation, as broadly construed in *Shore Line*, "by exercising its . . . managerial right in selling its rail lines under terms that change the employees' working conditions—*i.e.*, their active employment." Reply Brief for Appellants 8.

RLEA argues further that because "the Act's purposes require that a carrier not alter the working conditions out of which the dispute arose . . ., it logically follows that the status quo obligation should prevent the carrier from doing what the Section 6 notice seeks to limit." *Id.* at 8 n.7. In effect, RLEA's concept of "status quo" is not tied to existing agreements or practices; it is defined by the wishes of the unions as expressed in their bargaining proposals. We disagree.

Although the treatment of *Telegraphers* and *Shore Line* in *P&LE* did turn in part on the partial/total distinction, we cannot accept RLEA's attempt to limit the Supreme Court's reasoning to cases in which a railroad decides to "sell all its lines and go out of business." *P&LE*, 491 U.S. at 508 n.17. Like our sister circuits, we can find no sensible basis for distinguishing between a sale of all assets and a sale of individual lines. *See Chicago & N.W. Transp. Co. v. RLEA*, 908 F.2d 144, 152, 155 (7th Cir. 1990) (*"C&NW v. RLEA"*), *cert. denied*, 111 S. Ct. 1073 (1991); *RLEA v. C&NW*, 890 F.2d at 1025. *See also RLEA v. Chesapeake W. Ry.*, 738 F. Supp. 1544, 1555 (E.D. Va.), *aff'd on other grounds*, 915 F.2d 116 (4th Cir.

1990). The fundamental rule of *P&LE*, in our view, is that the railroad's "freedom to leave the market," 491 U.S. at 508 n.17, by terminating an operation or selling assets, is a matter of managerial prerogative. Nothing in the RLA indicates that a union can usurp that prerogative by filing a section 6 notice proposing to add a successorship clause to the collective bargaining agreement and then claiming that the railroad would violate the status quo by selling its assets before the termination of bargaining over the proposal. *See id.* at 509.

The freedom to leave the market includes the sale of individual rail lines. As the Seventh Circuit reasoned,

> [t]he decision to sell a line is not a decision about the utilization of labor or about wages, work rules, working conditions, job rights, etc. It is a decision to reduce the extent of the railroad's business, . . . not a decision about labor inputs. It has of course consequences for the workers—any major business decision does. But if this were enough to make it a change in pay, work rules, or working conditions, then . . . there would be no management prerogatives; and [*P&LE*] . . . would be incoherent.

C&NW v. RLEA, 908 F.2d at 152. *See also First National Maintenance*, 452 U.S. at 677-79.

P&LE did not overrule *Telegraphers* and *Shore Line*, but it plainly limited their application. We think it now apparent that in the absence of an existing obligation in a labor agreement (or perhaps some past practice that has "ripened into a commitment," *C&NW v. RLEA*, 908 F.2d at 154), the railroad's capacity—the number of lines it operates—is not part of the status quo. Both *Telegraphers* and *Shore Line* involved the "utilization of labor," *id.* at 152: in *Telegraphers*, the concentration of work stations along a line, and in *Shore Line*, the location of work assignments. These are areas in which employees might reasonably expect that a long-established practice

"would not be changed without bargaining." 491 U.S. at 506. But the unions could not reasonably expect CSXT to continue to own and operate unprofitable lines, or management to consult with the unions before selling such lines. *See id.* at 507.

Contrary to RLEA's premise, continued employment is not necessarily a working condition. *P&LE* establishes that at least in the context of management's freedom to withdraw from the market, "the relationship of employer-employee and the state of being employed" are not frozen by the status quo provisions of the RLA. *See* 491 U.S. at 505. The unions do have the right to bargain over the effects of line sales on employees. *See id.* at 512. But the transactions themselves may not be stalled by the railroad's bargaining obligations. *See C&NW v. RLEA*, 908 F.2d at 153. Thus, even assuming CSXT had to bargain over RLEA's section 6 notices, we hold that CSXT did not violate the status quo provisions by consummating its partial line sales.

This conclusion follows even though in the present case, unlike *P&LE*, RLEA served its notices before CSXT had set the terms of its sales agreements. Nothing in the Supreme Court's status quo analysis depended on the timing of the section 6 notices. The Court's conclusion that in the absence of an existing obligation in a labor contract, a union cannot invoke the RLA status quo provisions to prevent the railroad from withdrawing from the market is equally applicable whether the section 6 notice is served before the railroad has agreed to the terms of the transaction or after the terms are set. In either case, we believe, section 6 does not give the union the right to "dictate the terms of the sale, and in effect challenge[] the decision to sell itself." 491 U.S. at 512.

Our application of *P&LE* also comports with our duty to interpret the RLA to complement the ICA. *See id.* at 510. The ICC has plenary authority to approve these sales, and it plays an important role under the ICA in

effectuating economically efficient transactions. *See id.* at 510-11. Use of the RLA's status quo obligation to halt a sale approved by the ICC under section 11343 would short-circuit the functioning of the ICC and would bring the two statutes into conflict. *See C&NW v. RLEA*, 908 F.2d at 153. Like the Court in *P&LE*, we decline to create such a conflict. *See* 491 U.S. at 510-11.

Section 11341(a) of the ICA provides that a carrier in an approved transaction "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction." 49 U.S.C. § 11341(a). The Supreme Court has recently held that section 11341(a) abrogates collective bargaining obligations and supersedes the RLA as necessary to carry out an ICC-approved transaction. *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1164-65 (1991). CSXT argues that we may affirm the district court on the alternative ground that under the immunity clause in section 11341(a), the ICC's approval of the sales preempts any bargaining and status quo obligations imposed by the RLA. Given our conclusion that the status quo obligation does not stand in the way of the ICC-approved sales, and given that CSXT's bargaining obligations are not before us, we have no need to explore the preemption question.

III. Conclusion

The status quo obligation of the RLA does not apply to a railroad's sale of some of its lines. The scope of CSXT's duty to bargain over the effects of the sales is not before us. Accordingly, the district court's order dismissing RLEA's action is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DICTRICT OF COLUMBIA

Civil Action No. 89-2639

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

Washington, D.C.
May 9, 1990
2:10 p.m.

EXCERPT OF TRANSCRIPT OF HEARING ON
PENDING MOTIONS BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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NICHOLAS S. YOVANOVIC, ESQ.
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[2] EXTRACTED PROCEEDINGS

THE DEPUTY CLERK: Civil Action 89-2639, Railway Labor Executives Association versus CSX Transportation. Mr. Clarke for the plaintiff; Mr. Johnson for the defendant.

* * * *

THE COURT: All right. This matter comes before the Court on the defendant's motion to dismiss. The issues involve the sale by CSX Transportation, Incorporated, the defendant, of six partial segments of their lines now and prospectively, additional segments that are brought in issue by the complaint where they may sell off other, what they have determined to be marginal lines, to other rail carriers.

The Court has been well-educated by counsel for both sides on a number of issues of labor law that the Court has never dealt with before, but other courts have dealt with. The Court is satisfied on the record before it that the motion to dismiss must be granted.

In the Court's view, the mere ownership and operation of rail lines is not a working condition preserved by the Railway Labor Act status quo and I believe that's what the Supreme Court determined in the controlling case cited by counsel of *Pittsburgh & Lake Erie Railroad v. The Railway Labor Executives Association*, 109 S. Ct. 2584.

The Court is satisfied that the rationale set forth by the Supreme Court in the *Pittsburgh* case does not make a [3] distinction between partial and total sales. The Court notes that the Eighth Circuit had that question squarely presented in *Railway Labor Executives Association v. Chicago & Northwestern Transportation Company, et al.*

In a decision filed on November 29th, 1989 and attached as Exhibit A to the defendant's motion, the Eighth Circuit expressly holds on this point that the question presented in their case, which is on all fours with this case, is whether, with respect to a sale of some lines, rather than all of its assets to another corporation, the

status quo would, in any way, give the unions a right to an injunction enjoining the sale while bargaining went forward. The Eighth Circuit concluded it would not.

The Court also notes that Judge Ellis in the Eastern District of Virginia, at page 108 of the transcript of an oral ruling he issued—I understand today he's not yet issued his written opinion, but in an oral ruling, he indicated that his own interpretation of footnote 17 and of the Supreme Court's opinion in *Pittsburgh* was that there's no difference in partial and total sales as well.

The Court notes here that plaintiffs concede that the defendant has the right to sell these marginal lines; the plaintiffs also concede that there's nothing in the existing labor agreements between plaintiffs and the defendant that would prevent the sales, nothing expressed anyway. [4] The plaintiffs concede that the present agreements between the plaintiffs and the defendant allow force reductions and furloughs that occur and the Court believes, as a result of line sales, those are allowed as well. By implication of the agreements, I find that the sales will therefore not violate the status quo and that the sales by the railroad can go forward.

Partial line sales going forward was the square question presented to the Eighth Circuit in the case cited and the Eighth Circuit came out squarely on this issue. Plaintiff today conceded that the Eighth Circuit case involved a case where Section VI notices had been given prior to at least some, if not all of the sales involved in that case.

The Court is also persuaded that I have no jurisdiction to consider the ICC's ruling or their interpretation of the *New York Dock* conditions that they've imposed as a condition of the sales. I agree with the defendant that the only statutory constraint before these sales going forward is in the Interstate Commerce Act and that the Interstate Commerce Commission is the body to enforce that statute and I have no jurisdiction as to how they choose to enforce that statute.

Plaintiffs or defendant here can, of course, seek direct review of any ICC ruling in the Court of Appeals, but that is not a matter that can be presented to me.

As soon as the ICC requirements have been met, the [5] defendant here is free to go forward with the sales contemplated. As to whether beyond the status quo issue there is a duty to bargain, the defendant has represented, and plaintiffs cconcede, that the defendants are, in fact, bargaining.

In the Court's view of whether this bargaining is legally required or not then does not present a present case or controversy until the point at which the railroad refuses to bargain. In that even, of course, the plaintiffs may have a case or controversy if they refuse to bargain about the effects of the sale. But, of course, while that bargaining goes forward, the sale will not and cannot be enjoined by a court, in this Court's view.

For the reasons indicated in open court then, I'll issue an order granting the motion to dismiss for the reasons stated on the record. In light of that, the defendant's motion in the alternative for summary judgment will be denied as moot, that being unnecessary to reach and the plaintiffs' motion for summary judgment will also be denied as moot.

I terms of appellate review of this determination, I take it in light of the President's board, that there's not going to be an emergency stay motion anyway or can you tell?

MR. CLARKE: Well, Your Honor, we might have one because the Brandywine sale is set to go forward on June 2nd.

THE COURT: So you might want a stay pending appeal to enjoin the Brandywine sale. You can do that by motion. [6] I'll rule on it promptly so you can get that issue then presented to the Court of Appeals by June 2nd. I take it that would be the time crunch, if you decide to go forward with a stay pending appeal, would be that before June 2nd?

MR. CLARKE: That's correct, Your Honor. June 2nd seems to be the first planned sale.

THE COURT: Anything further we should do today then?

MR. CLARKE: No, Your Honor. Your Honor, I assume that you will not be issuing a further findings of facts and conclusions of law?

THE COURT: I'll just say for the reasons stated in open court.

MR. CLARKE: That's fine. Thank you.

MR. JOHNSON: Nothing further, Your Honor.

THE COURT: Thank you very much, counsel. Nice job from both counsel.

MR. CLARKE: Thank you, Your Honor.

MR. JOHNSON: Thank you, Your Honor.

[Whereupon at 3:55 p.m., the above-entitled matter was adjourned.]

* * * *

[7] I certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

/s/ Carrie Lucina Gansle
CARRIE LUCINA GANSLE, CVR
Official Court Reporter

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-2639
(RCL)

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs,

v.

CSX TRANSPORTATION, INC.,
Defendant.

ORDER

[Filed May 9, 1990]

This case came before the court on May 9, 1990 for a hearing on all pending motions. For the reasons stated on the record in open court, it hereby is

ORDERED, that:

1. Defendant's motion to dismiss is GRANTED.

2. Defendant's motion in the alternative for summary judgment is DENIED AS MOOT.

3. Plaintiffs' motion for summary judgment is DENIED AS MOOT.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: May 9, 1990

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-7079

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Appellants

v.

CSX TRANSPORTATION, INC.,
Appellee

Before: Wald, Buckley and Sentelle, Circuit Judges

ORDER

[Filed Sept. 19, 1991]

Upon consideration of appellants' petition for rehearing, filed August 5, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

I. Relevant Excerpts of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

A. Section 2 First, 45 U.S.C. § 152 First

B. Section 5 First, 45 U.S.C. § 155 First

C. Section 6, 45 U.S.C. § 156

D. Section 10, 45 U.S.C. § 160

Relevant Excerpts of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

A. Section 2 First, 45 U.S.C. § 152 First:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 5 First, 45 U.S.C. § 155 First:

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties

to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

C. Section 6, 45 U.S.C. § 156:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences, without request for or proffer of the services of the Mediation Board.

D. Section 10, 45 U.S.C. § 160

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten

substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may deem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

APPENDIX F

EXAMPLE OF SECTION 6 NOTICES AT ISSUE

[Excerpt from Section 6 Notice by Petitioner International Brotherhood of Boilermakers and Blacksmiths, dated May 31, 1988, taken from Joint Appendix at [79-81]

* * * *

[79] ARTICLE XII—SHORT LINE SALES

1. The number of employees in the service of this carrier on January 1, 1987, represented by this Organization shall not [80] be reduced for any reason, including partial or complete abandonment, sale, merger, trackage rights, lease, technological change or decline in business.

2. No employee with more than one year of service with this carrier who is represented by this Organization shall be placed in a worse position with respect to his compensation or working conditions or any reason except resignation, retirement, death or dismissal for justifiable casue. Failure to relocate shall not be considered as cause to deprive an employee of the protection of this provision.

3. The carrier agrees to give six months advance notice to this Organization before it abandons any line, or portion thereof, discontinues any service, sells or transfers an interest in any line or portion thereof, merges, or otherwise affects its ownership or right to exclusive possession and operation of a line of railroad; these events are hereinafter referred to as a transaction. If requested by this Organization, the carrier agrees to negotiate an agreement to provide for the application of this Agreement to the particular transaction and to provide for the selection of forces to perform the affected work before it consummates any transaction which may cause the readjustment or rearrangement of forces.

4. Before any agreement with another carrier or third party to commit a transaction referred to in provision number 3 is entered into which involves the direct or indirect transfer [81] of operations over the rail line involved or at the facility involved, this carrier will require the acquiror, transferee, purchaser, lessee, trackage rights tenant, or new operator of the line or facility to offer, in seniority order, to hire the employees whose seniority rights are affected by the transaction at issue, and to assume all obligations of this carrier toward those employees who accept such an offer of employment including all existing rates of pay, rules and working conditions, including this agreement.

5. Any employee adversely affected by the carrier's failure to abide by the terms of this Agreement shall receive, in addition to a make-whole-remedy, penalty pay equal to three times the lost pay, fringe benefits, and consequential damages suffered by such employee.

6. Any dispute or controversy over the application or interpretation of this Agreement shall be handled on the property between the International Representative and the Carrier's highest designated officer and may be referred by the employee or by this Organization for adjustment in accordance with Section 3, Second of the Railway Labor Act to a Special Board of Adjustment to be established nationally by all parties to this Agreement.

* * * *

APPENDIX G

LIST OF RLEA AFFILIATED ORGANIZATIONS

American Railway & Airway Supervisors Association (Division of TCU);[1]
American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Brotherhood of Railway Carmen (Division of TCU);[1]
Hotel Employees and Restaurant Employees International Union;
International Association of Machinists and Aerospace Workers;[2]
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen & Oilers;
International Longshoremen's Association;
National Marine Engineers' Beneficial Association;
Seafarers International Union of North America;
Sheet Metal Workers' International Association;
Transport Workers Union of America; and
Transportation•Communications International Union (TCU).[1]

---

[1] On August 5, 1991, TCU's International President gave notice of his intent to withdraw, along with the Presidents of TCU's Divisions, from membership in RLEA as of September 1, 1991. RLEA and TCU presently disagree as to the effectiveness of that notice under the RLEA By-Laws.

[2] On August 26, 1991, the designated chief executive officer of the IAM gave notice of his intent to withdraw from membership in RLEA as of September 1, 1991. RLEA and IAM also disagree as to the effectiveness of that notice under the RLEA By-Laws.

Supreme Court, U.S.
FILED
FEB 3 1992
OFFICE OF THE CLERK

No. 91-972

In The
Supreme Court of the United States
October Term, 1991

AMERICAN TRAIN DISPATCHERS ASSOCIATION, et al.,
Petitioners,

v.

CSX TRANSPORTATION, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT CSX TRANSPORTATION, INC.'s BRIEF IN OPPOSITION

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CSX TRANSPORTATION, INC.

February 3, 1992

QUESTION PRESENTED

Does the Railway Labor Act's status quo obligation preclude a railroad from selling some of its rail lines, where the Interstate Commerce Commission has authorized the sale and the railroad's unions admit that the railroad has the managerial right, unrestricted by any collective bargaining agreement, to sell lines of its railroad.

RULE 29.1 STATEMENT

Respondent CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation.

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In The
Supreme Court of the United States
October Term, 1991

No. 91-972

AMERICAN TRAIN DISPATCHERS ASSOCIATION, et al.,

Petitioners,

v.

CSX TRANSPORTATION, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

RESPONDENT CSX TRANSPORTATION, INC.'s BRIEF IN OPPOSITION

CSX Transportation, Inc. ("CSXT") respectfully requests that this Court deny the petition for certiorari submitted by the American Train Dispatchers Association

and seven other unions (hereinafter "unions"),[1] seeking review of the D.C. Circuit's decision reported at 938 F.2d 224 (D.C. Cir. 1991) (hereinafter "*RLEA v. CSXT*").[2] The D.C. Circuit's decision was fully consistent with *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives Association*, 491 U.S. 490 (1989) (hereinafter "*P&LE*"), as well as three other appellate decisions reaching the same conclusion,[3] and with the proper administration of the Railway Labor Act ("RLA").

COUNTERSTATEMENT OF THE CASE

Like other large railroads, CSXT has been selling rail lines that were unprofitable or only marginally profitable to new or existing short line railroads, which were willing to take the risk that they could revitalize these lines and attract new business. Congress encouraged such sales when it amended the Interstate Commerce Act ("ICA") in 1980 by the Staggers Rail Act. Previously, such marginal lines were more often abandoned by the major carriers.

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[1]The two largest rail unions, Transportation Communications International Union and United Transportation Union, have dropped out of this case. *See* Pet. at ii.

[2]The D.C. Circuit's decision is also reproduced in Appendix A to the Petition CSXT cites pages in the reproduced opinion as "Pet. at ____".

[3]*CSXT v. United Transp. Union*, 139 L.R.R.M. (BNA) 2061 (2d Cir. 1991); *Chicago & Northwestern Transp. Co. v. RLEA*, 908 F.2d 144 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1073 (1991); *RLEA v. Chicago & Northwestern Transp. Co.*, 890 F.2d 1024 (8th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 3237 (1990).

Line sales to a non-railroad are subject to approval by the Interstate Commerce Commission ("ICC") pursuant to Section 10901 of the ICA, 49 U.S.C. § 10901. Sales to existing railroads are subject to ICA Section 11343, 49 U.S.C. § 11343. A key difference between the two types of transactions is that, in a Section 11343 sale, the ICC is required by statute to impose labor protective conditions upon the transaction. 49 U.S.C. § 11347. These conditions, commonly called the *New York Dock* conditions, provide that employees of the selling railroad who may be adversely affected by the sale are guaranteed their wages for up to six years and are eligible for other benefits. The cost of these protections are borne by the selling carrier. *RLEA v. CSXT,* 938 F.2d at 225, Pet. at 3a.[4] In Section 10901 transactions, the ICC has discretion whether to impose labor protective conditions. *See, e.g., P&LE,* 491 U.S. at 498-501. Although the unions complain in their Petition that the ICC changed its policy of imposing labor protections in line sales in the early 1980's, Pet. at 3, this change only related to the ICC's discretionary authority in Section 10901 sales. The specific line sales challenged in this case were Section 11343 sales, which were subject to the mandatory *New York Dock* conditions. *RLEA v. CSXT,* 938 F.2d at 225, Pet. at 3a.

As rail labor conceded in the Courts below, CSXT's line sales do not violate any provision in its collective bargaining agreements with its unions. However, when the parties' collective bargaining agreements came open

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[4]The ICC's application of its *New York Dock* protections in Section 11343 line sales was upheld in *RLEA v. ICC,* 930 F.2d 511 (6th Cir. 1991), which involved one of the line sales also at issue in this case. The unions did not seek this Court's review of the Sixth Circuit's affirmance of the ICC.

for amendment in 1988, the unions served bargaining proposals, called Section 6 notices in RLA parlance, seeking to improve their rates of pay and other benefits.[5] Among other topics, the unions proposed that a successorship provision be added to their collective bargaining agreements. This provision would require a railroad involved in a line sale, lease, or similar transaction, to protect its employees from any adverse impacts by obligating the acquiring entity to assume the selling carrier's unions, collective bargaining agreements, and employees. The railroads, including CSXT, served counter Section 6 notices on the unions. CSXT and the unions agreed that their respective bargaining proposals, including the successorship proposal, would be handled in national bargaining between railroads such as CSXT and the unions, which had agreed to the national bargaining.[6]

The service of the parties' Section 6 notices initiated the RLA's procedures for amending collective bargaining agreements, sometimes called the "major" dispute procedures. These procedures, involving bargaining, mediation, cooling-off periods, and, occasionally, Presidential and Congressional intervention, have been characterized as "purposefully long and drawn out," *Brotherhood of Ry. & S. S. Clerks v. Florida E. Coast Ry.*, 384 U.S. 238, 246 (1966), and "almost interminable,"

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[5]The written bargaining proposals take their name from Section 6 of the RLA. 45 U.S.C. § 156.

[6]Many of the nations' railroads have historically bargained with the unions on a national, multi-employer basis. *See, e.g., United Transp. Union v. Grand Trunk Western R.R. Co.*, 133 L.R.R.M. (BNA) 2845 (6th Cir.), *cert. denied*, ___ U.S. ____, 111 S. Ct. 55 (1990).

Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 149 (1969) (*"Shore Line"*). In *Shore Line*, this Court explained that, during the pendency of these procedures, the parties had to maintain the status quo. That status quo requirement embraced the working conditions out of which the dispute arose.

Bargaining and mediation under the auspices of the National Mediation Board ("NMB"), pursuant to Section 5 of the RLA, 45 U.S.C. § 155, failed to produce settlement of the parties' Section 6 proposals. The unions conceded that CSXT participated in these efforts. *RLEA v. CSXT*, 938 F.2d at 226, Pet. at 5a. The President then appointed an emergency board, Presidential Emergency Board No. 219 ("PEB"), pursuant to Section 10 of the RLA, 45 U.S.C. § 160, to recommend a settlement of the disputed issues.

District Court Proceedings

In the meantime, the unions took the position that, once they had served their Section 6 notices seeking to bargain new benefits for employees affected by line sales, CSXT could no longer sell rail lines until after the RLA's major dispute procedures had been exhausted. According to the unions, the working conditions here included the continued operation and ownership by CSXT of all of the rail lines which it owned or operated on the particular day the unions served their respective Section 6 notices. They brought a complaint in District Court against CSXT, where they sought to enjoin, as a violation of the RLA status quo, six specific Section 11343 line sales to short line railroads, which had been approved by the ICC.

The unions argued that their case was not controlled by *P&LE*, which they would limit to the situation where a railroad was selling all of its rail lines. Instead, the unions relied on this Court's decisions in *Shore Line* and *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330 (1960) ("*Telegraphers*"), for their construction of the RLA status quo. In *Telegraphers*, the Court held that a railroad had to bargain over its decision to reduce and consolidate the number of stations along its rail lines. In *Shore Line*, the Court held that the rail yard reporting points where employees historically reported for work assignments were working conditions subject to the status quo requirement. Therefore, the railroad could not alter such reporting points without first exhausting the RLA's major dispute procedures.

CSXT took the position that the rationale of *P&LE* applied equally to the sale by a railroad of portions of its system as to all of its rail system. Hence, under this Court's *P&LE* decision, the ownership and operation of rail lines were not working conditions within the meaning of the RLA's status quo requirement. The District Court agreed and dismissed the unions' complaint.

Appellate Proceedings

The unions then appealed to the D.C. Circuit, which agreed with the District Court that the case was controlled by *P&LE*. The D.C. Circuit found itself in agreement with other appellate courts which had heard these same unions' arguments and concluded that there was "no sensible basis" to limit *P&LE's* rationale to its facts, as they unions urged, citing *Chicago & Northwestern*

Transportation Co. v. RLEA, 908 F.2d 144, 152 (7th Cir. 1990) (*"C&NW v. RLEA"*), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1073 (1991); and *RLEA v. Chicago & Northwestern Transportation Co.*, 890 F.2d 1024, 1025 (8th Cir. 1989), cert denied, ___ U.S. ___, 110 S.Ct. 3237 (1990). 938 F.2d at 229, Pet. at 10a. The D.C. Circuit denied rehearing and rehearing en banc on September 19, 1991.

Subsequent PEB and Congressional Proceedings

As the unions note in their petition, while their appeal was pending, the PEB investigated the labor dispute between the railroads and unions. The PEB received written submissions and conducted hearings on the parties' positions in collective bargaining, including on the line sale issue. *See Report to the President by Emergency Board No. 219* at 15-18 and 116 ("Several other issues, such as the Organizations' proposals regarding Line Sales, were also considered by the Board.") (Jan. 15, 1991). Indeed, the unions made a separate presentation to the PEB on the line sale issue, urging it to adopt their successorship proposal. Ultimately, although the PEB adopted certain union proposals, it did not include in its recommendations the unions' line sale proposal. The PEB also recommended a moratorium, until November 1, 1994, on the service of new Section 6 notices, by labor or management, which sought to re-open matters that were or could have been raised during this round of bargaining. The purpose of the moratorium was to ensure labor peace during this period.

Under the RLA, the PEB's recommendations are not binding and were rejected by the unions. A resulting

one-day nation-wide rail strike was ended when Congress imposed the PEB's recommendations on the parties in Public Law No. 102-29 (April 18, 1991). Congress there also created a Special Board, which the parties could ask to modify the PEB's recommendations. *Id.* § 2. In fact, the unions asked the Special Board to modify the moratorium in the PEB report to allow unions to re-open the line sale issue. The Special Board found that "the recommendations of PEB 219 are fair and demonstrably equitable" and rejected their request for modification in a report issued July 18, 1991. *Report of the Special Board (102-29), Requests for Modification of the Report of Emergency Board No. 219 (Executive Order No. 12714)* at 15 (July 18, 1991). The PEB's recommendations became effective July 28, 1991.

REASONS WHY THE PETITION SHOULD BE DENIED

The unions argue that Supreme Court review is justified for two reasons. First, they argue that the D.C. Circuit's decision was contrary to this Court's opinions in *P&LE*, *Shore Line*, and *Telegraphers*. Second, they fall back on the old saw that review is necessary for the proper administration of a statute, here the RLA. Neither claim is true; the Petition should be denied.

This Court recently visited in *P&LE* the issue presented by the unions' Petition. While *P&LE's* holding that the RLA's status quo requirement did not preclude consummation of an ICC-authorized line sale was in the context of a total line sale, the *P&LE* opinion's rationales clearly apply to partial line sales, as the D.C. Circuit and

three other circuits have held.[7] The uniform application by these courts of appeal of the clear reasoning of this Court does not warrant review of the D.C. Circuit decision.[8]

Furthermore, the D.C. Circuit's application of *P&LE* to a partial line sale was correct. Two rationales underlay *P&LE*. First, not all topics are mandatory subjects of bargaining under the RLA. This Court held in *P&LE* that the decision to sell rail lines was a "management prerogative" and that the unions had no expectation that "labor would have a substantial role in the decision to sell or in negotiating the terms of the sale." 491 U.S. at 507. Second, *P&LE* found its construction of the RLA was necessary to avoid a conflict with the ICA and that statute's encouragement of line sales. As the D.C. Circuit concluded, both of these rationales apply equally to partial line sales. Just as there is no indication Congress intended in the RLA that unions be able to dictate the terms of a total line sale,

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[7]*See* note 3 *supra*. The unions avoided the possibility of yet another adverse appellate decision by voluntarily dismissing their appeal in *RLEA v. Union Pacific Railroad Co.*, No. 90-110DA (D. Ore. May 14, 1991), *appeal dismissed*, No. 91-35753 (9th Cir. 1991). That Court, like the District Court here, dismissed an essentially identical union complaint on the same basis upheld by the D.C. Circuit. *See also MT Properties, Inc. v. Transportation-Communications Int'l Union*, 914 F.2d 1083, 1089 (8th Cir. 1990).

[8]As the Ninth Circuit stated in *United States v. Underwood*, 717 F.2d 482, 486 (9th Cir. 1983), *cert denied*, 465 U.S. 1036 (1984), "[i]n the decision of individual cases the [Supreme] Court must and regularly does establish guidelines to govern a variety of situations related to that presented in the immediate case. The system could not function if lower courts were free to disregard such guidelines whenever they did not precisely match the facts of the case in which the guidelines were announced."

there is no indication of any intent to give unions that power over partial line sales.

In addition, by arguing *P&LE* should be limited to its facts, the unions completely ignore the second basis for the *P&LE* holding -- the "obligation to avoid conflicts between two statutory regimes, namely, the RLA and ICA, that in some respects overlap." 491 U.S. at 510. The unions' Petition omits any reference to this aspect of *P&LE*. The D.C. Circuit correctly concluded that the need to give effect to the RLA and ICA had equal force in the circumstance of partial line sales, which obviously occur more frequently than a total line sale. Moreover, the obligation to avoid a conflict with the ICA is even stronger in the context of Section 11343 transactions, given this Court's recent decision that ICC authorization of such transactions can supersede inconsistent RLA obligations. *Norfolk & W. Ry. v. American Train Dispatchers' Ass'n*, ___ U.S. ___, 111 S. Ct. 1156 (1991).[9]

Supreme Court review also is unnecessary for the proper administration of the RLA. As indicated, there is no disagreement among the lower courts on the implications of *P&LE*. In addition, nothing in the D.C. Circuit decision precludes the unions from again raising the issue of the effects on employees of line sales when the parties' agreements are susceptible to amendment in 1994.

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[9]Unlike the sales identified in the unions' complaint here, the line sale at issue in *P&LE* was subject to ICC approval under Section 10901 rather than Section 11343 of the ICA.

I. The D.C. Circuit's Decision Was Fully Consistent with *P&LE*

Here, as in *P&LE*, the unions argued that, once they served Section 6 notices seeking to amend their agreements to obligate the railroad to require any purchaser, as a condition of the sale, to take the seller's unions, agreements, and employees, the railroad could not consummate the sale until the RLA's major dispute procedures had been exhausted. Otherwise, the unions argued, the railroad would violate the RLA status quo requirement. The unions also contended that scope of the status quo obligation was defined by the scope of the bargaining obligation. Relying on *Telegraphers*, the unions argued that the railroad had to bargain over its decision to sell as well as the sale's effects on employees. Since the unions' bargaining demands, if adopted, would dictate in part the terms of the sale, in order to preserve the status quo, the railroad had to forgo the sale during bargaining.

In *P&LE* the Court rejected the unions' construction of the RLA status quo and bargaining requirements as unsupported by the statute or legislative intent. The RLA limits mandatory subjects of bargaining to "rates of pay, rules, or working conditions." 45 U.S.C. § 156. In essence, this Court found the RLA did not intend that all topics be mandatory subjects of bargaining. P&LE's decision to sell its rail lines and reduce employment was held to be a managerial prerogative and not "a change in the conditions of employment forbidden by the status quo provision of § 156." 491 U.S. at 509. The Court distinguished *Shore Line*, as having "extended the relevant language of § 156 to its outer limits. . . ." *Id.* at 506.

The Court then limited *Shore Line* and *Telegraphers* to their facts and further distinguished them on the basis that they did not involve the fundamental decision of "a railroad's freedom to leave the market." *Id.* at 508 n.17.[10] This Court also found that its construction of the RLA was necessary to fulfill its obligation to avoid conflicts between two statutory regimes, the RLA and ICA. *Id.* at 510. *See, also, id.* at 511 ("[W]e are confident that the RLA is reasonably subject to a construction that would, at least to a degree, harmonize the two statutes."). The Court recognized that the unions' construction of the RLA would frustrate Congress' intent in the ICA to encourage the timely sale of failing rail lines. *Id.* at 510-11.

The D.C. Circuit applied these rationales to a partial line sale. The unions concede that the D.C. Circuit's "conclusions are consistent with this Court's decision in *P&LE* . . . ." Pet. at 12. However, the unions argue that *P&LE* should be limited to the facts of a railroad going completely out of the rail business. While this Court limited its *holding* in *P&LE* to the facts before it, nothing in *P&LE* indicates that its *reasoning* would not apply to partial line sales. As the D.C. Circuit found, a managerial decision to sell part of a rail system is not qualitatively different from the decision to sell all rail lines. Both decisions involve "a railroad's freedom to

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[10]The unions apparently reference the 1936 Washington Job Protection Agreement as some evidence that rail unions have an expectation to bargain over a railroad's decision to sell lines. Pet. at 14. However, as the Petition itself explains, that Agreement went to effects, not to the decision itself. Moreover, the Agreement related to mergers, not line sales. From the undisputed fact that CSXT's agreements contain no restrictions on its right to sell parts of its rail system, it is clear that heretofore the unions have never had any expectation to affect the terms of such sales.

leave the market." *RLEA v. CSXT*, 938 F.2d at 228, Pet. at 9a-10a (quoting *P&LE*, 491 U.S. at 508 n.17). The unions now argue that CSXT was not, in fact, leaving the market, because the subject rail lines would still be operated by someone, who will interchange freight with CSXT. Pet. at 17-18. An argument that the D.C. Circuit misconstrued facts never presented to the District Court is hardly the basis for Supreme Court review. In any event, there was no basis for the unions' contention that CSXT did not leave the markets where it sold lines of its railroad. The fact that CSXT may interchange rail traffic with the new railroads does not mean CSXT has not left these markets and redirected its capital. As a common carrier, CSXT is required by law to interchange with all rail carriers with which it interconnects. This in no way alters the fact that, after the sale, markets left by CSXT are served by lines owned and operated by independent carriers, unaffiliated with CSXT. These carriers are responsible for the service provided on these lines and for their success or failure.[11]

Furthermore, as in the case of a total line sale, there is no indication in the language or purpose of the RLA that Congress intended unions to be able to dictate the terms of partial line sales or preclude such sales through their bargaining demands. Yet, that is the result the unions are seeking. Under their construction of the RLA status quo, CSXT would have had to cease selling rail lines for the three year period the parties were in bargaining over the parties' Section 6 notices. This argument is made despite the unions' admission that

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[11]Moreover, in many of these sales, the purchaser has connections with other railroads.

CSXT's management right to sell rail lines was not limited by existing collective bargaining agreements. According to the union theory, CSXT could resume selling lines after this period, but only until November 1994, when the unions would again be free to serve new Section 6 notices relating to line sales. Presumably, CSXT would again be barred from consummating line sales until after exhaustion of that round of bargaining, and so-on and so-forth. As the D.C. Circuit found, the unions "concept of 'status quo'. . . is defined by the wishes of the unions as expressed in their bargaining proposals," 938 F.2d at 229, Pet. at 10a, a concept for which there is no support in the RLA.

The D.C. Circuit also heeded *P&LE's* admonition that the Courts have an obligation to construe the RLA to avoid conflicts with the ICA. *RLEA v. CSXT*, 938 F.2d at 230, Pet. at 12a (citing *P&LE*, 491 U.S. at 510-11). The unions' argument in this case would create an even greater conflict between the RLA and ICA than was present in *P&LE*. It would be an anomalous result to avoid a conflict with the ICA in the relatively rare instance of a total line sale, but not in the more common partial line sale. Understandably, the unions nowhere address this aspect of *P&LE* in their Petition.

Similarly, the D.C. Circuit, like this Court in *P&LE*, properly distinguished *Shore Line* and *Telegraphers*. Neither decision involved a carrier's decision to sell lines. In *Shore Line*, the issue was whether the railroad had to bargain over a change in employees' reporting points. In *Telegraphers*, the issue was whether the railroad had to bargain over the reduction in the number of train stations it would staff along rail lines it would continue to own and operate. In neither case did the railroad propose to

sell its rail lines. The D.C. Circuit's conclusion that *Telegraphers* and *Shore Line* involved the "utilization of labor," rather than the scope of a carrier's business was fully consistent with this Court's characterization of these decisions in *P&LE*. 491 U.S. at 508 n. 17. These two decisions also did not involve the need to "harmonize" the RLA and ICA.[12]

Finally, the D.C. Circuit did not run afoul of *Telegraphers* or footnote 23 of *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (hereinafter "*First National Maintenance*"), by importing *First National Maintenance's* balancing test into the RLA. The D.C. Circuit, while citing, without discussion, *First National Maintenance*, clearly relied on *P&LE* for its holding. Moreover, *First National Maintenance*, like *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965), is fully consistent with *P&LE*. All three decisions involved an employer's decision to restructure its business and, as a result, "leave the market" through the sale of operation. In contrast, as explained, *Telegraphers* was not about leaving a market or the utilization of capital, but the utilization of labor. But, even if the scope of mandatory bargaining were broader under the RLA than the National Labor Relations Act ("NLRA"), the RLA clearly still does not make all topics bargainable.[13]

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[12]There is absolutely no basis for the unions' suggestion that *P&LE* drew a distinction between total and partial line sales based on constitutional considerations. Pet. at 13. The *P&LE* opinion nowhere discusses any such considerations.

[13]While unnecessary to decision in this case, there is no reasoned basis for the unions' claim that the scope of mandatory bargaining is broader under the RLA than the NLRA. There is *dicta* to this effect in *P&LE*, 491 U.S. at 508

(continued...)

II. Supreme Court Review Is Unnecessary for the Proper Administration of the RLA

The unions do not articulate with any specificity or clarity why Supreme Court review is "of exceptional importance to the orderly administration of the [RLA]." Pet. at 11. Contrary to the unions' implication, the D.C. Circuit's decision in no way impairs labor relations in the rail industry; nor does it impair the unions' ability to bargain over the effects of line sales.[14] During this round of bargaining, the unions were able to have the line sale issue considered by the railroads, the NMB, the PEB, Congress, and the Special Board. In other words, the RLA worked exactly as Congress intended. The fact that rail labor did not obtain what it desired through this process and may seek bargaining over line sales again after the contracts come open for amendment in November 1994, also does not justify Supreme Court

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[13](...continued)
n.17, and *First National Maintenance*, 452 U.S. at 687 n.23. Nothing in the language of the RLA, however, requires this conclusion. Indeed, the legislative history of the NLRA indicates that the scope of RLA bargaining is narrower than under the NLRA. *Inland Steel Co. v. NLRB*, 170 F.2d 247, 254-55 (7th Cir. 1948), *aff'd on other grounds sub nom. Am. Communications Ass'n v. Douds*, 339 U.S. 382 (1950). Additionally, the judicial gloss that RLA bargaining is broader is no longer valid in view of congressional intent, as expressed in the Staggers Act, that railroads have at least the same ability as other employers to make critical decisions regarding the scope of their business. *See United States v. Fausto*, 484 U.S. 439, 453 (1988).

[14]CSXT took the position that there was no mandatory effects bargaining obligation in Section 11343 sales, because of the ICC's exclusive jurisdiction and imposition of statutory labor protections addressing the effects on employees from such sales. However, the effects issue was presented by the unions to the PEB. CSXT and the nature of the effects bargaining obligation in such sales never became an issue in this case. *See RLEA v. CSXT*, 938 F.2d at 226, Pet. at 5a.

review. Nor is there "an urgent need for a definitive resolution to this controversy," Pet. at 17, because, the line sale issue has been put to rest by the four appellate decisions rejecting the unions' characterization of the status quo requirement in partial sales. The unions' contention that these decisions "lack a consistent thread," Pet. at 16, is meritless. All relied upon *P&LE*. The unions themselves concede that the D.C. Circuit and Second Circuit decisions employed the same rationale. *Compare RLEA v. CSXT* with *CSXT v. United Transportation Union,* 139 L.R.R.M. (BNA) 2061 (2d Cir. 1991) *("CSXT v. UTU")*. While the Seventh Circuit posited alternative rationales, all were premised upon *P&LE, see, e.g., C&NW v. RLEA,* 908 F.2d at 152, 155, and the Seventh Circuit's decision was cited with approval by the D.C. and Second Circuits, neither of which saw any inconsistency. *CSXT v. UTU,* 139 L.R.R.M. at 2067; *RLEA v. CSXT*, 938 F.2d at 224. Pet. at 11a. The D.C., Second and Seventh Circuits also cited with approval the Eighth Circuit's decision.

Finally, there is also no urgent need for this Court's review, because, as the unions' own Petition demonstrates, bargaining between the parties on the line sale issue is closed until November 1994. At that time, the unions will be free to serve new Section 6 notices and, if they so desire, raise the issue of the effects of line sales again.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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